78-1482

Supreme Court, U. S.
FILED
MAR 27 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF

THE UNITED STATES

October Term of 1978

AN APPEAL FROM THE
SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

ELMER L. MEYERS
APPELLANT

VS.

CLAYTON CHILCOTE
APPELLEE

CASE NO.

Counsel of Record

ELMER L. MEYERS
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225

WALTER C. BEALL
Attorney for Appellee
200 Dixie Terminal Building
Cincinnati, Ohio 45202

TABLE OF CONTENTS

Page

STATEMENT OF FACTS

Statement of the Case . . . . . 1 & 2

Statement of Facts . . . . . .2 thru 4

ARGUMENT

First Proposition of Law . . . .4 thru 7
The trial court erred to the prejudice of the plaintiff-appellant in dismissing his action for failure to prosecute. A court may only dismiss an action after notice is given to plaintiff's counsel of the pending dismissal.

AUTHORITIES

Ohio Rules of Civil Procedure 41(B)(1) and Rule 58 . . . . . 3 thru 6

Cases:

Rankin v. Coffer, App.1961,174 N.E.2d 631,85 O.L.A.391 5

Boyle v. Public Adjustment & Const. Co., 1950,87 Ohio App.264,93, N.E. 2d 795,42 O.O.478,57 O.L.A. 129 5

Constitution of U.S. 14th Amendment & Article 1, Section Two and Sixteen of the Ohio Constitution of 1851 . . . . . 7 & 10

Second Proposition of Law . . . 7 thru 11
The trial court erred to the prejudice of the plaintiff-appellant in overruling his motion to strike or relieve from judgment.
The court may relieve a party from a final judgment or other for mistake, inadvertence or any other reason justifying relief from judgment.

TABLE OF CONTENTS (Cont'd)

AUTHORITIES	Page
Ohio Rules of Civil Procedure Rule 60(B), 41(B)(1), 60(B)(3)	7 thru 9
Cases: Wabash-Portlane Cement Co. V. State Dept. of Highway, 1955,98 Ohio App. 209,128 N.E. 2d 847, 570.).242 Appropriation 104 App.243,148 N.E. 2d 242	7
Constitution of U.S. 14th Amendment & Article 1, Section Two and Sixteen of the Ohio Constitution of 1851	7 & 10
CONCLUSION	11

SUPREME COURT OF
THE UNITED STATES

ELMER L. MEYERS, :
APPELLANT :
VS. : No.
CLAYTON CHILCOTE, :
APPELLEE :

This is a matter on appeal to the Supreme Court of the United States involving a substantial constitutional question and the appeal is taken pursuant to Title 28 USC § 1257 (2).

The following questions are presented by this appeal;

1. Denial of Due Process of the Appellant under the Fifth and Fourteenth Amendment of the United States Constitution.

2. Denial of the Appellant's Day in Court as is guaranteed by the Constitution of the United States.

3. Not being duly served.

4. Abuse of Discretion by the trial court and misconduct and lack of discretion.

5. Denial of a hearing as is required by the Civil Rules of Procedure.

NATURE OF THE PROCEEDINGS

I. STATEMENT OF THE CASE:

This is an appeal to the Supreme Court of the United States from the final

judgment of December 27, 1978 on a motion for reconsideration of denial of jurisdiction of the court's December 1, 1978 decision; dismissing appellant's appeal to the Supreme Court of the State of Ohio. Notice of Appeal in this matter was filed January 11, 1979 and a copy thereof is attached.

Plaintiff-Appellant filed complaint in the Hamilton County Common Pleas Court on September 24, 1975 being Case A-757779, styled Elmer L. Meyers V. Clayton Chilcote, for malicious prosecution. On May 5, 1977 the complaint was dismissed for failure to prosecute. On May 16, 1977 plaintiff's motion to relieve or strike was overruled and on July 6, 1977 was appealed to the Court of Appeals. On August 2, 1978 the Court of Appeals affirmed the judgment and on August 31, 1978 was appealed to the Supreme Court of Ohio.

II. STATEMENT OF FACTS:

On September 24, 1975 in Common Pleas Court, Plaintiff-Appellant sued Defendant-Appellee for malicious prosecution; Defendant-Appellee had brought a false charge sworn to under oath by a false affidavit against Plaintiff-Appellant.

On February 13, 1976 a report was held and both parties attended, having received notice by mail.

On April 21, 1976 plaintiff-appellant received, by regular mail, from adverse party's counsel, a copy of an entry dismissing his action under Civ. R. 41 (B) (1), plaintiff failed to prosecute. This copy of the entry was not dated, stamped, signed, nor filed or journalized. Since the entry was not filed with the clerk for journalization nor at any time whatsoever journalized or entered to the appearance docket as required by Civ. R. 58, there is no dismissal or effective judgment.

> The 1971 amendment of rule 58 defines a judgment effective only when filed with the clerk for journalization---- when filed the clerk should stamp it immediately and journalize it promptly.

At no time has the defendant-appellee demonstrated he holds an effective dismissal entry of April 21, 1976 such as stamped "Entered" by the clerk and dated when filed.

At no time, as required by Civ. R. 41 (B) (1), was a motion to dismiss served on the plaintiff-appellant.

During the month of April, 1976 reports were scheduled and not once did plaintiff-appellant receive notice. The case was set for report on April 12, 1976, continued for report on April 21, 1976 and not once was the plaintiff-appellant served notice or duly served by motion that his case would be dismissed.

On April 17, 1977 a Motion To Strike or Relieve from Judgment was filed to correct the error of the trial judge and trial court and the memorandum of this motion called for the case to proceed to trial.

> Since there is not an effective judgment entered, as called for in the rules of civil procedure, the April 17, 1977 motion is filed in reasonable time.

On April 28, 1977, the trial court denied plaintiff's motion and would not set a trial date and on May 16, 1977 dismissed plaintiff's complaint.

ARGUMENT

Plaintiff-Appellant in his appeal to the Court of Appeals assigned two errors of the trial court which are:

I. FIRST PROPOSITION OF LAW:

The motion to dismiss should not have been granted because a motion to dismiss was not served upon plaintiff as is required by Civ. R. 41 (B) (1). The Court of Appeals takes the position "In the absence of any evidence to the contrary, we presume that defendant's motion to dismiss was granted after full compliance with Civ. R. 41 (B) (1)."

Plaintiff-Appellant argues that there was not full compliance with the rule and says;

(A) For dismissal of an action under Civ. R. 41 (B) (1), failure to prosecute, there must be a motion and duly served upon the adverse party. There was no motion. Such conduct denied the plaintiff his right to oppose a motion.

(B) Under Rule 58 the judgment or entry of dismissal is not effective. At no time was the entry journalized or entered to the appearance docket. As in Rankin V. Coffer, App. 1961, 174 N.E. 2d 631,85 O.L.A. 391.,--------entries become effective only when entered of record. Then in Boyle V. Public Adjustment & Const. Co., 1950,87 Ohio App. 264,93 N.E. 2d 795,42 O.O. 478,57 O.L.A. 129 The pronouncement, written or oral, of a Judge is not action of a court unless it is entered upon the journal. The 1971 amendment of rule 58 defines a judgment effective only when filed with the clerk for journalization--------when filed the clerk should stamp it immediately and journalize it promptly. There is no evidence of any entry of dismissal being filed at any time in 1976 nor prior to May 5, 1977. The only evidence of an entry of dismissal being filed with the clerk is the entry of May 5, 1977 stamped "Entered May 5, 1977, Image 254."

On April 21, 1976 this case was set for report. When the plaintiff failed to appear

it was dismissed under Civ. R. 41 (B) (1). This dismissal was not filed with the clerk for journalization, not stamped, not entered. This dismissal was then entered over a year later on May 5, 1977. The rule requires notice to plaintiff's counsel of the motion for dismissal before the court before such dismissal can be effective.

It is a point of contention whether the plaintiff-appellant received notice of the reports. Plaintiff-Appellant contends that he received no notice of anything. Defendant-Appellee argues otherwise. However, it is even admitted by the defendant-appellee in his memorandum that the case was set for report on April 21, 1976 only. The case was not set for a hearing on a motion to dismiss.

However, as stated, Rule 41 (B) (1) requires notice to the plaintiff's counsel of the motion to dismiss. As this was not done such dismissal by the trial court was improper and must be reversed by this court. What should have been done under the Rules in this case; when the plaintiff failed to appear for the April 21, 1976 report, the case should have been set down at a subsequent date for "motion to dismiss." A notice should have been mailed to plaintiff informing him of the new date and motion before the court. If plaintiff then failed to appear at this date, the case would have

been dismissed. As this was not done, plaintiff's rights under the Ohio Rules of Civil Procedure were violated and thusly the dismissal was improper and void.

II. SECOND PROPOSITION OF LAW:

The plaintiff-appellant says there is abuse of discretion and that the judgment herein can be set aside under Civ. R. 60 (B). The Court of Appeals takes the position there is no such abuse. Plaintiff-Appellant argues;

(A) In April of 1976 reports were scheduled by the trial court for April 12, 1976 and continued to April 21, 1976 and plaintiff-appellant not once received notice of the scheduled reports or the motion to dismiss, as is required by Rule 41 (B) (1). Plaintiff-Appellant argues he was not duly served and was not made aware of any such reporting and that such conduct of the trial court is in violation of his constitutional rights, due process of law, one's day in court, and one's rights under the Fourteenth Amendment of The Constitution of the United States and the State of Ohio. In Wabash-Portland Cement Co. V. State Dept. of Highway, 1955,98 Ohio App. 209,128 N.E. 2d 847,570. 0. 242. "--------defendant had no notice and opportunity to be heard in opposition--------, order of --------was abuse of discretion."

(B) The plaintiff-appellant, the one being the party bringing the action, the pursuer; it would be absurd and most illogical to argue that he ignored the hearings or reports scheduled in April of 1976 and any accusation that he was properly notified is clearly erroneous. Plaintiff-Appellant must demand supporting proof of service such as a green signature card as is done by certified mail.

(C) Furthermore, being denied the right to attend the April 1976 scheduled report hearings, not being duly served, further adding to the abuse of discretion; the case at no time was set for a hearing on a motion to dismiss.

(D) The trial court failed to comply with the requirements of Civ. R. 41 (B) (1) and such failure constitutes mistake or inadvertence by the trial court. Also part (5) of rule 60 (B), "any other reasons justifying relief" was a basis for the plaintiff's motion to strike or relieve from judgment. In chambers the court found that the appellant received notice. But for the reasons stated supra, the court had no basis for such a finding. Also the court found that the plaintiff's motion was not filed within a reasonable time after dismissal. However, the docket reveals that the motion to relieve was filed prior to this entry of

dismissal of May 5, 1977 and that plaintiff's motion of April 19, 1977 called the case for trial, and that therefore the motion was filed within a reasonable time as no appealable order or judgment existed until May 5, 1977 under Rule 12(a) of the Ohio Appellate Rules. To rule that the motion to strike or relieve from judgment was not filed in reasonable time is without merits.

(E) The trial court found also that the plaintiff did not have a meritorious claim and it is argued that a proper reading of plaintiff-appellant's amended complaint does most certainly present a meritorious claim, and the court was clearly in error to rule to the contrary. Further, it is submitted and argued that the court should have held a formal hearing with plaintiff's testimony to make such a determination regarding the claim. Herein on April 28, 1977, when the trial court denied plaintiff's motion, plaintiff was present in court, but testimony was not taken as the motion was decided in judge's chambers and for this the court erred.

(F) Considering disregard for the rules, the mistakes of the trial court, all the wrongs and errors by the court, derogatory remarks written on the original Common Pleas court case jacket, and abuse of discretion, that there exists to a degree misconduct under Civ. R. 60 (B) (3), "------ or other misconduct of an adverse party."

The Fourteenth Amendment to the Constitution of the United States and Article I, Section Two and Sixteen of the Ohio Constitution of 1851 guarantees due process to the citizens of the State of Ohio. In Re. Appropriation, 104 App. 243, 148 N.E. 2d 242. Prior to a person being denied a valuable right or property he must be afforded "due process." In this case reference is to procedural due process which guarantees a person the right to a procedure, a way of doing something, that allow him to guard a valuable right as may be given by statute or in the Civil Rules, or any other substantive rights.

A notice of proceedings and an opportunity to be heard at such hearing is the minimum required by the Constitutional provisions heretofore cited. This cause leans strongly on reasonable time and not being duly served and so there exists a substantial constitutional question; should one be heard; be entitled to due process of law, one's day in court and one's right under the Constitution of the United States and the State of Ohio. Such issues should be considered a matter of great interest and the protection of such a matter should not be impaired or impeded.

The trial court failed to use discretion in that it did not exercise any function of supervision so as to protect that valuable procedural due process rights of the plaintiff with respect to the scheduled report

hearings of which plaintiff was not notified.

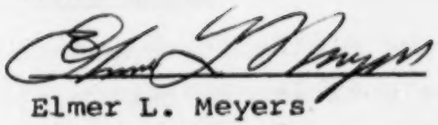
CONCLUSION

The plaintiff-appellant takes exception to the decision by the Court of Appeals affirming the judgment of the trial court. The court could not have fully considered the assignments of error nor could they have taken into consideration the fact that due process of law did not prevail, that plaintiff-appellant was not duly served and this denied his constitutional right to his day in court and his right to be heard.

Plaintiff-Appellant urges the Court to take jurisdiction and give him relief from the wrongful judgment; that mistakes, wrongs, errors by the court, prejudice toward him based on certain derogatory remarks written on the original Common Pleas Court case jacket, and violation of constitutional rights exist.

The appeals court erred by not reversing the decision of the trial court and by not ordering the original action to be set for trial in Hamilton County Common Pleas Court, Plaintiff-Appellant urges the Supreme Court of the United States to accept this appeal and give him his day in court as guaranteed him by the Constitution of the United States and the State of Ohio.

Dated: March 26, 1979



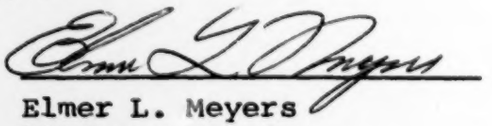
Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513)542-8888

SUPREME COURT OF THE UNITED STATES

ELMER L. MEYERS APPELLANT	:	
VS.	:	No.
CLAYTON CHILCOTE APPELLEE	:	PROOF OF SERVICE

I have this date delivered a copy of the Jurisdictional Statement and the Appendix to the Jurisdictional Statement, by personal delivery to the Attorney for the Appellee, Beall, Hermanies and Bortz, Walter C. Beall of Counsel, 200 Dixie Terminal Building, Cincinnati, Ohio 45202, this day of March 26, 1979.

Date: March 26, 1979



Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513)542-8888

78-1482

Supreme Court, U. S.
FILED
MAR 27 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF

THE UNITED STATES

October Term of 1978

AN APPEAL FROM THE
SUPREME COURT OF OHIO

APPENDIX TO JURISDICTIONAL STATEMENT

ELMER L. MEYERS
APPELLANT

VS.

CLAYTON CHILCOTE
APPELLEE

CASE NO.

Counsel of Record

ELMER L. MEYERS
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225

WALTER C. BEALL
Attorney for Appellee
200 Dixie Terminal Building
Cincinnati, Ohio 45202

APPENDIX

	Page
Entry of the Court of Common Pleas Dismissing Action For Failure to Prosecute (Unsigned and not dated)	1
Copy of Appearance Docket Statement of Proceedings True copy of May 3, 1976	2
Motion to Strike; Motion To Relieve From Judgment filed in Court of Common Pleas	3 & 4
Entry of Dismissal filed in Court of Common Pleas date May 5, 1977 (Signed Entry)	5
Opinion of the Court of Common Pleas, Entry Overruling Plaintiff's Motion To Strike Or To Relieve From Judgment	6
Certified True and Correct Transcript of the Docket and Journals Entries and Original Papers at July 6, 1977	7 & 8
Notice of Appeal to the First District Court of Appeals	9
Brief of Plaintiff-Appellant filed in the Court of Appeals Note - Assignment of Errors a part of and found therein the Brief	10 thru 16
Opinion of the Court of Appeals, Memorandum Decision and Judgment Entry of the Court of Appeals	17 thru 19

APPENDIX (Cont.)

	Page
Notice of Appeal to the Supreme Court of Ohio	20
Memorandum in Support of Claimed Jurisdiction of the Ohio Supreme Court	21 thru 34
Order of The Ohio Supreme Court overruling Motion For Jurisdiction	35
Motion For Reconsideration of Denial of Jurisdiction	36 thru 39
Order of The Ohio Supreme Court. Final Judgment of December 27, 1978	40
Exhibit A - Copies of envelopes indicating proper procedure in serving a defendant or plaintiff	41
Rule 41, Rule 58, and Rule 60, Ohio Rules of Civil Procedure	42 thru 44
Notice of Appeal to the United States Supreme Court	45 & 46

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ELMER L. MEYERS
Plaintiff
-vs-
CLAYTON CHILCOTE
Defendant

NO. A-757779

ENTRY DISMISSING ACTION FOR FAILURE TO PROSECUTE

The Court hereby dismisses this action pursuant to Ohio Rule of Civil Procedure 41(B)(1) becuase the plaintiff has failed to prosecute.

COPY OF APPEARANCE DOCKET # 827

True Copy as of May 3, 1976 as certified by Edna Schira, Deputy

Case No. A-757779

Elmer L. Meyers
Plaintiff
-vs-
Clayton Chilcote
Defendant

STATEMENT OF PROCEEDINGS

9-24-75	Complaint filed summons issued with copy of complaint to Sheriff of Fairfield County, Ohio. Relief demanded Money. Paid on account by E L Meyers $35.00 LB $2.00
10-10-75	Summ ret endorsed by Shef Fairfield Co. rec on 9-29-75 & on 9-29-75 serv same on Clayton Chilcote by delivery to him a true copy of s-c.Fee $4.25 Hon Berry, Sher - by M.M. Abner Deputy
10-14-75	Motion for a definite statement filed.
12- 8-75	Amended complaint filed
12-23-75	Answer of defendant Clayton Chilcote filed.

A TRUE COPY
ATTEST ROBERT D. JENNINGS

A TRUE COPY May 3, 1976

ATTEST ROBERT D. JENNINGS

CLERK OF THE HAMILTON COUNTY COURT, HAMILTON COUNTY, OHIO

Edna K. Schird Deputy

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ELMER L.MEYERS
Plaintiff

VS.

CLAYTON CHILCOTE
Defendant

NO. A-757779

MOTION TO STRIKE
MOTION TO RELIEVE
FROM JUDGMENT

Plaintiff Elmer L. Meyers, by and through his counsel, hereby moves this Court, under 7(B) of the Ohio Rules of Civil Procedure, for an order striking the entry of dismissal of this action, or in the alternative for an order, under Rule 60 (B), relieving the plaintiff from final judgment in this case.

Morris G. Sullivan

Morris G. Sullivan
Attorney for Plaintiff
4987 Relleum Ave.
Cincinnati, Ohio 45238
921-6018

MEMORANDUM

This is a case in limbo. On April 21, 1976, this Court signed an entry dismissing this action under Rule 41(B)(1). However, the entry has never been filed with the clerk for journalization. Thus under Rule 58 the judgment is not effective. The signed entry can be found in the case jacket.

Plaintiff requests the Court to strike this entry from the jacket as there is no final judgment, and have this case proceed to trial. Anyway, we submit that the dismissal of April 21, 1976 was improper for failure to comply with Rule 41(B)(1). This rule requires notice of such motion to dismiss to the Plaintiff or his counsel before a dismissal can be granted. No such notice was given herein, rendering the dismissal improper.

The record reveals that this case was set for report on April 12, 1976. At that time it was continued to April 21, the date of dismissal. Plaintiff or his counsel was not informed of a pending motion for dismissal under Rule 41.

On both April 12 and 21 also, neither Plaintiff or his counsel of record appeared due to lack of notice.

In the alternative, if there is a valid judgment herein, we ask for it to be set aside under Rule 60(B), for the reasons stated supra.

Morris G. Sullivan

Morris G. Sullivan
Attorney for Plaintiff

FILED
APRIL, 1977

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ELMER L. MEYERS
Plaintiff

VS

CLAYTON CHILCOTE
Defendant

NO. A-757779

ENTRY DISMISSING ACTION FOR FAILURE TO PROSECUTE

The Court hereby dismisses this action Pursuant to Ohio Rule of Civil Procedure 41(B)(1) because the plaintiff has failed to prosecute.

Morrissey J.

ENTERED
May 5, 1977
Image 254

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ELMER L. MEYERS
Plaintiff

VS

CLAYTON CHILCOTE
Defendant

NO. A-757779

ENTRY OVERRULING PLAINTIFF'S MOTION TO STRIKE OR TO RELIEVE FROM JUDGMENT

This matter came before the Court on the Motions of the plaintiff for an Order striking the Entry of Dismissal in this action, or in the alternative, for an order relieveing the plaintiff from final judgment in this case. The matter was submitted to the Court on the Memoranda of counsel and arguments, and upon consideration whereof, the Court finds that the plaintiff received notice of the dismissal under Rule 41(B) of the Ohio Rules of Civil Procedure, and further finds that the Motion to Relieve from Judgment was not filed within a reasonable time after the dismissal.

The Court further finds that after a consid--eration of the plaintiff's Amended Complaint, the plaintiff would not have a meritorious claim to present if relief were granted.

For the foregoing reasons, the Court finds that the motions are not well taken, and hereby overrules the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff's motions to strike and for relief from judgment be and the same are hereby overruled. Exceptions reserved to Plaintiff.

Morressey J.

Judge

Walter Beall

Walter C. Beal
Attorney for Defendant

M.G.Sullivan

Morris G. Sullivan
Attorney for Plaintiff

ENTERED
May 16, 1977
IMAGE 319 & 320

HAMILTON COUNTY
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case Number A-757779 — Filed on Sept 24,1975

ELMER L. MEYERS
Plaintiff
VS
CLAYTON CHILCOTE
Defendant

Complaint filed summons issued with copy of complaint to Sheriff of Fairfield County,Ohio

Relief demanded Money.
Paid on Account by E.L.Meyers $35.00 LB $2.00

Received this writ on the 29th day of Sept,75 at 12 P.M. and on the 29th day of Sept, 1975 I served the same on the within named Clayton Chilcote by delivering to him personally a true copy of summons and complaint.

Service	$3.00	
8 miles	1.25	Dan Berry, Sheriff
	$ 4.25	M.M.Olive, Deputy

Served by G. Yarbrough

Motion for a Definite Statement, filed.
Amended Complaint, filed.
Answer of Defendant, Clayton Chilcote,filed.

Motion to Strike; Motion to Relieve from Judgment filed.

Defendant's Memorandum in Opposition to Plainfiff's Motions to Strike or to Relieve form Judgment,filed.

Image #254-Entry Dismissing Action for Failure to Prosecute.

The Court hereby dismisses this action pursuant to Ohio Rule of Civil Procedure 41(B)(1) because the plaintiff has failed to prosecute.

Image #319 - Entry Overruling Plaintiff's Motion to Strike or to Relieve from Judgment.

This matter came before the Court on the Motions of the plaintiff for an Order striking the Entry of Dismissal in this action,or in the alternative, for an Order relieving the plaintiff from final judgment in this case. The matter was submitted to the Court on the Memoranda of counsel and arguments, and upon consideration whereof, the Court finds that the plaintiff received notice of the dismissal under Rule 41(B) of the Ohio Rules of Civil Procedure, and further finds that the Motion to Relieve from Judgment was not filed within a reasonable time after the dismissal.

The Court further finds that after a consideration of the plaintiff's Amended Complaint, the plaintiff would not have a meritorious claim to present if relief were granted.

For the foregoing reasons, the Court finds that the motions are not well taken, and hereby overrules the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff's motions to strike and for relief from judgment be and the same are hereby overruled. Exceptions reserved to Plaintiff.

Notice of Appeal filed #77361. Copy sent to Walter C. Beall, Attorney.

THE STATE OF OHIO)(
Hamilton County)(SS COMMON PLEAS COURT

I,Robert D. Jennings, Clerk of the Court of Common Pleas, within and for the County and State aforesaid, do hereby certify the within and foregoing to be a true and correct Transcrpt of the Docket And Journals Entries And Original Papers in the Case No. A-757779, C77361 wherein Elmer L. Meyers, Plaintiff-Appellant and Clayton Chilcote, Defendant-Appellee, as appears from the files and records now in my office.

Signed- July 6, 1977 by Ann Y. Wind, Deputy

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-757779

ELMER L. MEYERS
2278 Baltimore Ave.
Cincinnati, Ohio 45225
Plaintiff-Appellant

NOTICE OF APPEAL

VS

C 77361

CLAYTON CHILCOTE
69 Rainbow Dr.
Lancaster, Ohio
Defendant-Appellee

Notice is hereby given that Elmer L. Meyers, plaintiff, hereby appeals to the First District Court of Appeals, State of Ohio, from the entry of dismissal entered in this action on May 5, 1977, and from the entry overruling plaintiff's motion to strike or relieve from judgment entered in this action on May 16, 1977.

Morris G. Sullivan

Morris G. Sullivan
Attorney for Elmer L. Meyers, Plaintiff-Appellant
4987 Relleum Ave.
Cincinnati, Ohio 45238
921-6018

PRECIPE

TO THE CLERK:

Please prepare and transmit the Record of Appeal in the withing action, in accordance with Rules 9 and 10 of the Ohio Rules of Appellate Procedure, including therein all original papers, transcripts and exhibits thereto, filed in the Hamilton County Common Pleas Court in the within action.

FILED
6/3/77

Morris G. Sullivan

Morris G. Sullivan

COURT OF APPEALS

FIRST APPELLATE DISTRICT

HAMILTON COUNTY, OHIO

ELMER L. MEYERS

Plaintiff-Appellant

NO. C-77361

VS.

CLAYTON CHILCOTE

Defendant - Appellee

BRIEF OF PLAINTIFF- APPELLANT

Morris G. Sullivan
4987 Relleum Ave.
Cincinnati, Ohio 45238

Attorney for Plaintiff-Appellant

FILED
July 22, 1977

Walter C. Beall
49 E. 4th St.
Cincinnati, Ohio 45202
Attorney for Defendant-Appellee

I. TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

PAGE

II. STATEMENT OF THE CASE 2

III. ARGUMENT 3

First Assignment of Error 3

The trial court erred to the prejudice of the plaintiff-appellant in dismissing his action for failure to prosecute.

Issue Presented for Review and Argument 3

A Court may only dismiss a plaintiff's action for failure to prosecute after notice is first given to plaintiff's counsel of the pending dismissal.

AUTHORITIES

Ohio Rules of Civil Procdure 41(B)(1) 3

Second Assignment of Error 3

The trial court erred to the prejudice of the plaintiff-appellant in overruling his motion to strike or relieve from judgment.

Issue Presented for Review and Argument 3

The court may relieve a party from a final judgment or order for mistake, inadvertence or any other reason justifying relief from judgment.

I. TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

	PAGE
AUTHORITIES	
Ohio Rules of Civil Procedure 60(B)	3
Rules of Appellant Procedure 12(A)	4
IV. CONCLUSION	4

II. STATEMENT OF THE CASE

(A) Procedural Posture: Case A-757779

Appellant filed complaint for money in Hamilton County Common Pleas Court on September 24, 1975. On May 5,1977 the complaint was dismissed for failure to prosecute. On May 16,1977 appellant's motion to relieve or strike was overruled. This appeal is taken from both decisions.

(B) Statement of Facts

On September 24, 1975, the appellant filed suit against appellee for malicious prosecution (t.d. 1). The case was set for report on April 12, 1976. Appellant did not appear and it was continued for report on April 21, 1976. Again, Appellant did not appear and the trial court dismissed the action for failure to prosecute. It is a point of contention whether appellant was notified of these reports. The entry of dismissal was not entered until May 5,77, over one year later. (t.d. 8).

On April 28, 1977, the trial court denied appellant's motion to strike or relieve from judgment. This was entered on May 16, 1977,(t.d.9).

There is no transcript of any of these procedings.

III. ARGUMENT

On April 21, 1976 this case was set for report. When the plaintiff failed to appear it was dismissed under rule 41(b)(1). This dismissal was entered over a year later on May 5, 1977 (t.d.8). Rule 41(b)(1) requires notice to plaintiff's counsel of the motion for dismissal before the court before such dismissal can be effective.

It is a point of contention whether the appellant received notice of the reports. Appellant contends that he received no such notice of anything. Appellee argues otherwise. However it is even admitted by the appellee in his memorandum (t.d. 7) that the case was set for report om April 21,76 only. The case was not set for a hearing on a motion to dismiss. The Court Index on April 21, 1976 and preceding days list Meyers VS Chilcote under the heading of reports only. No mention is made of a pending motion of dismissal. Also, any notices sent by the assignment commissioner were for a report, with no mention of a motion for dismissal under rule 41.

However, as stated, rule 41(b)(1) requires notice to the plaintiff's counsel of the motion to dismiss. As this was not done such dismissal by the trial court was improper and must be reversed by this court.

On April 19, 1977 appellant filed a motion to strike or relieve from judgment (t.d.6). The original entry of dismissal was in the jacket of the case but had not been filed. The basis for the motion was rule 60(b), in that as stated supra, the trial court failed to comply with the requirements of rule 41(b)(1). Such failure constitutes mistake or inadvertence by the trial court. Also part (5) of 60 (b), "any other reason justifying relief" was a basis for appellant's motion.

In chambers the court found that the Appellant received notice (t.d.9). But for the reasons stated supra, the court had no basis for such a finding.

Also the court found that the motion was not filed within a reasonable time after the dismassal (t.d.9). However, the docket reveals that the motion to relieve was filed prior to the entry of dismissal of May 5, 1977 (t.d. 8).

We submit that the motion was filed within a reasonable time as no appealable order or judgment existed until May 5, 1977 under Rule 12 (a) of the Ohio Appellate Rules.

The trial court found also that the plaintiff-appellant did not have a meritorious claim (t.d.9). We submit that a reading of appellant's amended complaint does present a meritorious claim, and the court was clearly in error to rule to the contrary. Further we submit that the court should have held a

formal hearing with the plaintiff's testimony to make such a determination regarding the claim. Herein on April 28, 1977, when the court denied the motion, plaintiff was present in court, but his testimony was not taken as the motion was decided in judges chambers. For this the court erred.

IV. CONCLUSION

The court erred in granting the motion to dismiss for failure to prosecute, as clearly no notice of such motion as is required, was given to the plaintiff-appellant. The court again erred in denying plaintiff's motion to relieve which was based on this original error of the trial court. Plaintiff-appellant Elmer L. Meyers submits that both decisions of the trial court be reversed and the original action be set for trial in Hamilton County Common Pleas Court.

Respectfully submitted

Morris G. Sullivan

Morris G. Sullivan
4987 Relleum Ave.
Cincinnati, Ohio 45238
921-6018

Attorney for Plaintiff-Appellant Elmer L. Meyers

CERTIFICATE

I hereby certify that a copy of this brief was mailed to Walter C. Beall, Attorney for Defendant-appellee, at 49 E. 4th St., Cincinnati, Ohio 45202, by oridanary mail on the 22nd day of July, 1977.

Morris G. Sullivan

Morris G. Sullivan

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ELMER L. MEYERS, Plaintiff-Appellant	:	NO. C-77361
VS.	:	MEMORANDUM DECISION AND JUDGMENT ENTRY
CLAYTON CHILCOTE Defendant-Appellant	:	

Mr. Morris G. Sullivan, 4987 Relleum, Avenue, Cincinnati, Ohio 45238, for Plaintiff-Appellant.

Messrs. Beal, Hermanies and Borz, Walter C. Beall of counsel, 200 Dixie Terminal Building Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

The assignments of error, having been fully considered, are accordingly passed upon in conformity with App. R. 12(A) as set forth herein.

Plaintiff sued defendant for malicious prosecution. The case was dismissed under Civ. R. 41(B)(1) because plaintiff failed to prosecute. Plaintiff's subsequent motion for relief from Judgment was denied and he now appeals. We affirm the judgment below.

Plaintiff assigns two errors: that the trial court erred (1) in granting defendant's motion to dismiss under Civ. R. 41 (B)(1), and (2) in denying plaintiff's motion for relief from judgment under Civ. R. 60(B).

In his first assignment, plaintiff argues that the motion to dismiss should not have been granted because his attorney was never notified of the motion as required by Civ. R. 41(B)(1). The court's entry states that plaintiff's suit was dismissed "pursuant to" Civ.R. 41(B)(1). In the absence of any evidence to the contrary, we presume that defendant's motion to dismiss was granted after full compliance with Civ. R. 41(B)(1). In re Sublett (1959), 169 Ohio St. 19, 157 N.E.2d 324.

Plaintiff's second assignment of error attacks the denial of his motion for relief from judgment. The standard of review of the denial of a Civ. R. 60(B) motion is abuse of discretion. GTE Automatic Electric, Inc. V. ARC Industries, Inc.(1976), 47 Ohio St. 2d 146, 351 N.E.2d 113. Given the record in the instant case, we find no such abuse.

All assignments of error properly before this court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App.R.27.

To all of which the appellant, by his counsel, excepts.

Keefe, P.J., Bettman and Black, J.J.

ENTERED
AUG 2, 1978
IMAGE 45 & 44 & 43

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

ELMER L. MEYERS	:	No. C-77361
Plaintiff-Appellant	:	
vs.	:	NOTICE OF APPEAL
CLAYTON CHILCOTE	:	
Defendant-Appellee	:	

Notice is hereby given that Elmer L. Meyers hereby appeals to the Supreme Court of Ohio from the judgment entered in this action by the Court of Appeals for the First District on the 2nd day of August, 1978.

Elmer L. Meyers

Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513) 542-8888

FILED
AUGUST 31, 1978

IN THE SUPREME COURT OF OHIO

ELMER L. MEYERS	:	
PLAINTIFF-APPELLANT	:	
VS	:	No. 78-1268
CLAYTON CHILCOTE	:	
DEFENDANT-APPELLEE	:	

AN APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION OF THE SUPREME COURT

Respectfully submitted,

ELMER L. MEYERS, Plaintiff-Appellant
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513) 542-8888

Attorney for Defendant-Appellee
Beall, Hermanies and Bortz
Walter C. Beal, Attorney at Law
200 Dixie Terminal Building
Cincinnati, Ohio 45202

FILED
OCT 2, 1978

TABLE OF CONTENTS

PAGE

STATEMENT OF FACTS

Statement of the Case 1

Statement of Facts 1

ARGUMENT

First Proposition of Law 2
The trial court erred to the prejudice of the plaintiff-appellant in dismissing his action for failure to prosecute. A court may only dismiss an action after notice is given to plaintiff's counsel of the pending dismissal.

AUTHORITIES
Ohio Rules of Civil Procedure 41(B)(1) and Rule 58 ..... 1 & 2

Cases:
Rankin V. Coffer, App. 1961, 174 N.E.2d 631.85 O.L.A. 391 2

Boyle V. Public Adjustment & Const Co. 1950.87 Ohio App.264,93 N.E. 2d 795,42 Oo0478,57 O.L.A. 129 2

Court of Appeals, Memoradum Decision of August 2, 1978 2

Constitution of U.S. 14th Amend and Article 1 Section two and Sixteen of the Ohio Constitution of 1851 .....3 & 4

Second Proposition of Law .....3 & 4
The trial court erred to the prejudice of the plaintiff-appellant in overruling his motion to strike or relieve from from judgment.
The court may relieve a party from a final judgment or other for mistake, inadvertence or any other reason justifying relief from judgment.

TABLE OF CONTENTS

PAGE

AUTHORITIES
Ohio Rules of Civil Procedure Rule 60 (B), 41(B)(1), 60(B)(3) 3

Cases:
Wabash-Portland Cement Co. V. State Dept.of Highway, 1955, 98 Ohio App.209,128 N.E. 2d 847, 570.0.242 Appropriation 104 App.243,148 N.E. 2d,242 3

Constitution of U.S. 14th Amend and Article 1, Section Two and Sixteen of the Ohio Constitution of 1851 .....3 & 4

CONCLUSION 4

STATEMENT OF FACTS

STATEMENT OF THE CASE

This is an appeal taken from the affirmance of a judgment entry and decision rendered August 2, 1978 by the Court of Common Pleas by the First District Court of Appeals. A notice of appeal in this matter was filed August 31, 1978 and a copy thereof is attached.

Plaintiff-Appellant filed complaint in the Hamilton County Common Pleas Court on September 24, 1975 being Case A-757779, styled Elmer L. Meyers V. Clayton Chilcote, for malicious prosecution. On May 5, 1977 the complaint was dismissed for failure to prosecute. On May 16, 1977 plaintiff's motion to relieve or strike was overruled and on July 6, 1977 was appealed to the Court of Appeals.

STATEMENT OF FACTS

On September 24, 1975, in Common Pleas Court, plaintiff-appellant sued defendant-appellee for malicious prosecution, defendant-appellee had brought a false charge sworn to under oath by a false affidavit against plaintiff-appellant.

On February 13, 1976 a report was held and both parties attended, having received notice by mail. Court was advised that plaintiff secured legal counsel and within 60 days depositions would be taken.

On April 21, 1976 plaintiff-appellant received, by regular mail, from adverse party's counsel, a copy of an entry dismissing his action under Civ. R. 41 (B) (1), plaintiff failed to prosecute. The entry of dismissal was not filed with the clerk for journalization nor at any time whatsoever journalized or entered to the appearance docket as required by Civ. R. 58.

> The 1971 amendment of rule 58 defines a judgment effective only when filed with the clerk for journalization ------- when filed the clerk should stamp it immediately and journalize it promptly.

The only evidence of any entry of dismissal being filed with the clerk is the entry of May 5, 1977 stamped "Entered May 5, 1977, Image 254."

At no time, as required by Civ. R. 41 (b) (I), was a motion to dismiss served on the plaintiff-appellant, therefore he was denied his right to oppose the motion.

During month of April 1976 reports were scheduled and not once did plaintiff-appellant receive notice. The case was set for report on April 12, 1976. Plaintiff-appellant did not appear and it was continued for report on April 21, 1976. Again, plaintiff-appellant did not appear and the trial court dismissed the action for failure to prosecute. An entry of dismissal was not

filed with the clerk for journalization as required by the rule. The only entry filed with the clerk was May 5, 1977, over one year later. There is no transcript of any of these proceedings.

On April 17, 1977 a Motion to Strike, Motion to Relieve From Judgment was filed to correct the error of the trial judge and trial court and the memorandum of this motion called for the case to proceed to trial.

On April 28, 1977 the trial court denied appellant's motion to strike or relieve from the judgment. This was entered on May 16, 1977.

The motion of April 17, 1977 To Strike, Motion To Relieve From Judgment was filed in reasonable time.

ARGUMENT

Plaintiff-Appellant in his appeal to the Court of Appeals assigned two errors of the trial court which are:

FIRST PROPOSITION OF LAW

The motion to dismiss should not have been granted because a motion to dismiss was not served upon plaintiff as is required by Civ. R. 41 (B) (1). The Court of Appeals takes the position, "In the absence of any evidence to the contrary, we presume that defendant's motion to

dismiss was granted after full compliance with Civ. R. 41 (B) (1)."

Plaintiff-Appellant argues that there was not full compliance with the rule and says:

(A) For dismissal of an action under Civ. R. 41 (B) (1), failure to prosecute, there must be a motion and duly served upon the adverse party. There was no motion. Such conduct denied the plaintiff his right to oppose the motion.

(B) Under Rule 58 the judgment or entry of dismissal is not effective. At no time was the entry journalized or entered to the appearance docket. As in Rankin V. Coffer, App. 1961, 174 N.E. 2d 631,85 O.L.A. 391., -------entries become effective only when entered of record. Then in Boyle V. Public Adjustment & Const. Co., 1950,87 Ohio App.264,93 N.E. 2d 795,42 O.O.478,57 O.L.A. 129 The pronouncement, written or oral, of a Judge is not action of a court unless it is entered upon the journal. The 1971 amendment of rule 58 defines a judgment effective only when filed with the clerk for journalization ------- when filed the clerk should stamp it immediately and journalize it promptly. There is no evidence of any entry of dismissal being filed at anytime in 1976 nor prior to May 5, 1977. The only evidence of an entry of dismissal being filed with the clerk is the entry of May 5,

1977, stamped "Entered May 5, 1977, Image 254."

(C) Further, that Rule 58 prevails for reasons that the entry of dismissal is considered a judgment and is supported as such by the Court of Appeals in their Memorandum Decision of August 2, 1978, page 2, paragraph 4, "-------- it is the Order of this Court that judgment or final order herein appealed from be and the same hereby is, affirmed."

On April 21, 1976 this case was set for report. When the plaintiff failed to appear it was dismissed under Civ. R. 41 (B) (1). This dismissal was not filed with the clerk for journalization, not stamped, not entered. This dismissal was then entered over a year later on May 5, 1977. The rule requires notice to plaintiff's counsel of the motion for dismissal before the court before such dismissal can be effective.

It is a point of contention whether the plaintiff-appellant received notice of the reports. Plaintiff-Appellant contends that he received no notice of anything. Defendant-Appellant argues otherwise. However, it is even admitted by the defendant-appellee in his memorandum that the case was set for report on April 21, 1976 only. The case was not set for a hearing on a motion to dismiss

However, as stated, Rule 41 (B) (1) requires notice to the plaintiff's counsel of the motion to dismiss. As this was not

done such dismissal by the trial court was improper and must be reversed by this court. What should have been done under the Rules in this case, when the plaintiff failed to appear for the April 21, 1976 report, the case should have been set down at a subsequent date for "motion to dismiss." A notice should have been mailed to plaintiff informing him of the new date and motion before the court. If plaintiff then failed to appear at this date, the case would have been dismissed. As this was not done, plaintiff's rights under the Ohio Rules of Civil Procedure were violated and thusly the dismissal was improper and void.

SECOND PROPOSITION OF LAW

The plaintiff-appellant says there is abuse of discretion and that the judgment herein can be set aside under Civ. R. 60 (B). The Court of Appeals takes the position there is no such abuse. Plaintiff-Appellant argues:

(A) In April of 1976 reports were scheduled by the trial court for April 12, 1976 and continued to April 21, 1976 and plaintiff-appellant not once received notice of the scheduled reports or the motion to dismiss, as is required by Rule 41 (B) (1). Plaintiff-Appellant argues he was not duly served and was not made aware of any such reporting and that such

conduct of the trial court is in violation of his constitutional rights, due process of law, one's day in court, and one's rights under the Fourteenth Amendment of The Constitution of The United States and The State of Ohio. In Wabash-Portland Cement Co. V. State Dept. of Highway, 1955,98 Ohio App. 209,128 N.E.2d 847,570.0.242. "--------defendant had no notice and opportunity to be heard in opposition--------, order of--------was abuse of discretion."

(B) The plaintiff-appellant, the one being the party bringing the action, the pursuer; it would be absurd and most illogical to argue that he ignored the hearings or reports scheduled in April of 1976 and any accusation that he was properly notified is clearly erroneous. Plaintiff-Appellant must demand supporting proof of service such as a green signature card as is done by certified mail.

(C) Furthermore, being denied the right to attend the April 1976 scheduled report hearings, not being duly served, further adding to the abuse of discretion; the case at no time was set for a hearing on a motion to dismiss.

(D) The trial court failed to comply with the requirements of Civ. R. 41 (B) (1) and such failure constitutes mistake or inadvertence by the trial court. Also part

(5) of rule 60 (B), "any other reasons justifying relief" was a basis for the plaintiff's motion to strike or relieve from judgment. In chambers the court found that the appellant received notice. But for the reasons stated supra, the court had no basis for such finding. Also the court found that the plaintiff's motion was not filed within a reasonable time after dismissal. However, the docket reveals that the motion to relieve was filed prior to this entry of dismissal of May 5, 1977 and that plaintiff's motion of April 19, 1977 called the case for trial, and that therefore the motion was filed within a reasonable time as no appealable order or judgment existed until May 5, 1977 under Rule 12(a) of the Ohio Appellate Rules. To rule that the motion to strike or relieve from judgment was not filed in reasonable time is without merits.

(E) The trial court found also that the plaintiff did not have a meritorious claim and it is argued that a proper reading of plaintiff-appellant's amended complaint does most certainly present a meritorious claim, and the court was clearly in error to rule to the contrary. Further, it is submitted and argued that the court should have held a formal hearing with plaintiff's testimony to make such a determination regarding the claim. Herein on April 28, 1977,

when the trial court denied plaintiff's motion, plaintiff was present in court, but testimony was not taken as the motion was decided in judge's chambers and for this the court erred.

(F) Considering disregard for the rules, the mistakes of the trial court, all the wrongs and errors by the court, derogatory remarks written on the original Common Pleas court case jacket, and abuse of discretion, that there exists to a degree misconduct under Civ. R. 60 (B) (3), "--------or other misconduct of an adverse party."

The Fourteenth Amendment to the Constitution of the United States and Article I, Section Two and Sixteen of the Ohio Constitution of 1851 guarantee due process to the citizens of the State of Ohio. In Re. Appropriation, 104 App.243, 148 N.E. 2d. 242. Prior to a person being denied a valuable right or property he must be afforded "due process." In this case reference is to procedural due process which guarantees a person the right to a procedure, a way of doing something, that allows him to guard a valuable right as may be given by statute or in the Civil Rules, or any other substantive rights.

A notice of proceedings and an opportunity to be heard at such hearing is the minimum required by the Constitutional provisions heretofore cited. This cause

leans strongly on reasonable time and not being duly served and so there exists a substantial constitutional question; should one be heard; be entitled to due process of law; one's day in court and one's right under the Constitution of the United States and the State of Ohio. Such issues should be considered a matter of great interest and protection of such a matter should not be impaired or impeded.

The trial court failed to use discretion in that it did not exercise any function of supervision so as to protect that valuable procedural due process rights of the plaintiff with respect to the scheduled report hearings of which plaintiff was not notified.

CONCLUSION

The plaintiff-appellant takes exception to the decision by the Court of Appeals affirming the judgment of the trial court. The court could not have fully considered the assignments of error nor could they have taken into consideration the fact that due process of law did not prevail, that plaintiff-appellant was not duly served and thus denied his constitutional right to his day in court and his right to be heard.

Plaintiff-Appellant urges the Court to take jurisdiction and give him relief from the wrongful judgment; that mistakes, wrongs,

errors by the court, prejudice towards him based on certain derogatory remarks written on the original Common Pleas Court case jacket, and violation of constitutional rights exist.

The appeals court erred by not reversing the decision of the trial court and by not ordering the original action to be set for trial in Hamilton County Common Pleas Court. Plaintiff-Appellant urges the Supreme Court to accept this appeal and give him his day in court as guaranteed him by the Constitution of the United States and the State of Ohio.

Dated: September 30, 1978

Elmer L. Meyers

Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513) 542-8888

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	:	1978 TERM To wit: December 1, 1978
Elmer L. Meyers, Appellant,	:	No. 78-1268
vs.	:	MOTION FOR AN ORDER DIRECTING
Clayton Chilcote, Appellee.	:	THE COURT OF APPEALS for Hamilton County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Elmer L. Meyers

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ____ day of _____19__

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus.	:	No. 78-1268
Elmer L. Meyers, Appellant	:	MOTION FOR RECONSIDERATION OF DENIAL OF JURISDICTION
VS	:	
Clayton Chilcote, Appellee.	:	

The Appellant herein moves this court to reconsideration of its decision of Dec. 1, 1978 in the above captioned action, wherein it denied appellant's motion to certify.

MEMORANDUM IN SUPPORT OF RECONSIDERATION

On May 5, 1977 Plaintiff-Appellant's complaint was dismissed for failure to prosecute. A motion was filed to relieve or strike and on May 16, 1977 plaintiff's motion to relieve or strike was overruled and on July 6, 1977 was appealed to the Court of Appeals.

The trial court attempts to hold that on April 21, 1976 an entry for dismissal, dismissing plaintiff's action under Civ.R.41(B) (1), plaintiff failed to prosecute, was a judgment. However, the so-called entry by Rule 58 defines a judgment effective only when filed with the clerk for journalization. Since this was not done there is no effective judgment and for the trial court not to allow or

hold a hearing, as was called for in plaintiff's motion of May 16, 1977, clearly denied the plaintiff his day in court as guaranteed him by the 14th Amendment of the United States Constitution and the State of Ohio Constitution. This is a violation of his consttutional rights.

The issue appears to be whether or whether-not the Plaintiff-Appellant was duly served. The trial court alleges that a report card setting a report for April 12, 1976 was mailed the plaintiff and again for April 21, 1976. The court contends that because they assume they mailed out a card that that constitutes a serving. The Plaintiff-Appellant says he received no such notices and that if the court insists that they mailed notice; then let the trial court show proof of the serving, such as a green signed signature card as used in certified mail. Plaintiff-Appellant says, he who alleges must show support. In such case the court has assumed I was served, they have made an assumption that a serving took place and such procedure for serving a plaintiff or defendant should be declared unconstitutional by the Ohio Supreme Court. Plaintiff-Appellant says he has a meritorious claim for the following reasons:

1. Plaintiff in his capacity as acting secretary of the Columbus Detective Agency, Inc., issued a corporate check, payroll check, payable to one Mike Craig, an employee

of the corporation. Such check was issued in an attempt to decrease the amount owed on the arrears owed the guard employee. This was an amount or payment made on an indebtness and not a check transaction with purpose of intent to defraud.

2. Defendant, Clayton Chilcote, a third party, a complete stranger and unknown to the plaintiff, cashed said corporate payroll check for the corporate employee Mike Craig.

3. Defendant, Clayton Chilcote, a third party, with negligence, falsely, maliciously, willfully and wrongfully, brought a false charge Sworn to under Oath, against plaintiff accused plaintiff with the intent to defraud. The defendant wrongfully used the police department to collect a civil action or account.

4. On February 5, 1975 the court in Lancaster, Ohio dismissed the charges against the plaintiff.

5. At no time did the plaintiff, Elmer L. Meyers, receive money from the defendant, Clayton Chilcote, the defendant was a complete stranger to the plaintiff and at no time had they ever met.

Notice of proceedings and an opportunity to be heard at such hearing is the minimum required by the Constitutional provisions

of the United States Constitution and there exists a substantial constitutional question, should one be heard; be entitled to due process of law; one's day in court and one's right under the Constitution and should not be impaired or impeded.

The United States Tax Court in Washington, D.C. follows proper constitutional procedure in serving the petitioner in a case. Attached marked exhibit A is a copy of an envelope printed certified.

Plaintiff-Appellant urges the Court to take jurisdiction, to reconsider their denial and to render Appellant relief from the wrongful judgment and to guarantee him his day in court.

Dated: December 11, 1978

Elmer L. Meyers

Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, OHIO 45225
(513)542-8888

Certificate of Service

This is to certify that a copy of the foregoing Motion for Reconsideration has been served upon Walter C. Beall, Attorney for Defendant-Appellee, this 11th day of December, 1978.

Elmer L. Meyers

Elmer L. Meyers,
Attorney Pro Se

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus	:	1978 TERM
	:	To wit: December 27, 1978
Elmer L. Meyers, Appellant,	:	
	:	No. 78-1268
vs.	:	REHEARING
Clayton Chilcote, Appellee.	:	

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ____ Page ____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 27th day of December 1978.

THOMAS L. STARTZMAN Clerk

By _____ Deputy

Internal Revenue Service
Memphis, Tennessee 38110
Official Business
Penalty for Private Use, $300

CERTIFIED
No. 608072
MAIL

Postage and Fees Paid
Department of the Treasury
564

CERTIFIED MAIL

Mr. Beecham A. Lakes
106 Jefferson Court
Berea, KY 40403

NAME
1st Notice
2nd Notice
Return

POSTAGE AND FEES PAID
UNITED STATES TAX COURT

UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

BUSINESS
PENA.

Gordon Allen
272 Starks Street
Cincinnati, OH 45214

CERTIFIED MA

OHIO RULES OF CIVIL PROCEDURE

Rule 41

DISMISSAL

(B)(1) Involuntary dismissal. Provides that, upon motion by defendant or upon the court's own motion, plaintiff's claim may be dismissed for plaintiff's failure to prosecute, his failure to comply with the rules, or his failure to comply with a court order.

Rule 58

ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(B), upon a general verdict of a jury or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. Every judgment shall be specifically designated as a judgment. A judgment is effective only when so designated and when entered by filing with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of cost, Amended eff. July 1, 1971

1971 amendment. Deleted original second sentence, proving "Every judgment shall be specifically designated as a judgment."

Substituted "filed" for "so designated and when entered by filing."

1971 AMENDMENT OF RULE 58

Rule 58 has been amended to provide that "A judgment is effective only when filed with the clerk for journalization." ..... The amendment simplifies the language governing the effective date of the judgment.

The effective date of a judgment is extremely important for one reason among others because appeal time from the entry of a judgment or final order (Rule 54 defines a judgment as including a "decree or any order from which an appeal lies").

It should be noted in passing----------. The effective date could be when the judge signs the judgment. Or when the signed judgment is filed with the clerk. Or when the clerk journalizes the judgment. Or when the parties are notified of the judgment. The least troublesome effective date is the date selected by the rule, i.e., "A judgment is effective only when filed with the clerk for journalization." When the judgment is filed, the clerk should stamp it immediately and journalize it promptly. It should also be noted that the rule is silent as to how a party shall be notified of the entry of judgment. The notification problem remains a matter for local practice.

OHIO RULES OF CIVIL PROCEDURE

RULE 60

RELIEF FROM JUDGMENT OR ORDER

(B) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons; (1) mistake, inadvertence, suprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominted intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

THE SUPREME COURT OF THE STATE OF OHIO

ELMER L. MEYERS, :
APPELLANT :
VS. :
CLAYTON CHILCOTE, :
APPELLEE :

No. 78-1268

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Elmer L. Meyers, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of December 27, 1978 on a motion for reconsideration of denial of jurisdiction of the court's Dec. 1, 1978 decision; dismissing appellant's appeal to the Supreme Court of the State of Ohio.
2. This appeal is taken pursuant to Title 28 USC § 1257 (2).
3. The following questions are presented by this appeal.
   (a) Denial of Due Process of the Appellant under the Fifth and Fourteenth Amendment of the United States Constitution.

Dated: January 11, 1979

Elmer L. Meyers

Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513) 542-8888

PROOF OF SERVICE

I, Elmer L. Meyers, attorney pro se of record for Elmer L. Meyers, appellant herein, depose and say that on the 11th day of January, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Walter C. Beall, Attorney for the appellee upon his secretary at his office located at 200 Dixie Terminal Building, Cincinnati, Ohio.

Elmer L. Meyers

Elmer L. Meyers,
Attorney Pro Se

Subscribed and sworn to before me, at Cincinnati, this 11 day of January, 1979.

Arthur H. Pirman

Notary

Supreme Court, U. S.
FILED
MAY 21 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term of 1978

Case No. 78-1482

ELMER L. MEYERS,

Appellant,

v.

CLAYTON CHILCOTE,

Appellee.

MOTION TO DISMISS APPEAL

COUNSEL OF RECORD

WALTER C. BEALL
Attorney for Appellee
Beall, Hermanies & Bortz
200 Dixie Terminal Bldg.
Cincinnati, Ohio 45202

ELMER L. MEYERS
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

SUPREME COURT OF THE UNITED STATES

October Term of 1978

Case No. 78-1482

ELMER L. MEYERS,

Appellant,

v.

CLAYTON CHILCOTE,

Appellee.

MOTION TO DISMISS APPEAL

This is an attempted appeal from a decision of the Ohio Supreme Court refusing to take jurisdiction of an appeal from the Ohio First District Court of Appeals. The appellant's action does not contest the validity of any treaty or statute of the United States or a state statute and therefore the appeal jurisdiction of this court does not extend to an action of this nature. The decision below is reviewable, if at all, only by writ of certiorari. 28 USC Section 1257. Accordingly, the appeal should be dismissed and, treating the papers as an application for a writ of certiorari, the writ should be denied.

This case involves a situation which has already consumed more time and expense than can be justified by the circumstances. The appellant is an individual who admittedly issued a corporate check knowing that the corporation was insolvent. The corporate check was cashed at the appellee's place of business and the check was subsequently dishonored. When it appeared that because of the mis-

conduct of the appellant, the appellee was going to be required to bear the loss of the bad check, the appellee promptly notified the authorities who preferred criminal charges against the appellant. Thereafter, on the eve of the trial on the criminal charges, the appellant made restitution and the criminal charges then pending were dismissed. Rather than obtain legal advice on the matter, the appellant, acting as his own attorney, then filed a malicious prosecution action against the appellee. Due to the appellant's failure to appear at regularly scheduled court hearings on the case, the appellant's action was dismissed for want of prosecution pursuant to Ohio Civil Rule 41 (B). Despite notification that his case was being dismissed for failure to prosecute, the appellant took absolutely no action and had no contact with the court until a year later when he filed a Motion for Relief from Judgment pursuant to Ohio Civil Rule 60. The criteria for granting a Motion for Relief from Judgment under Rule 60 (B) of the Ohio Rules of Civil Procedure were set out by the Ohio Supreme Court in *GTE Automatic Electric, Inc.* v. *Arc Industries, Inc.*, 47 O.S.2d 146, 351 N.E.2d 113 (1976).

> "To prevail on a motion brought under Civil Rule 60 (B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civil Rule 60 (B) (1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken."

In ruling upon the appellant's Motion for Relief from Judgment, the trial court specifically found that the Motion was not filed within a reasonable time and further found that even if the appellant's Motion were granted, he

would not have a meritorious claim to present. These determinations were set forth in the Entry overruling the appellant's Motion to Strike or Relief from Judgment.

The proceedings in the trial court were subsequently reviewed on appeal by the Ohio First District Court of Appeals and the judgment of the trial court was affirmed. Thereafter, the appellant's Motion for Certification to the Ohio Supreme Court was denied.

The appellee would submit that this case involves no substantial federal question. While the appellant claims a denial of his right to due process under the law, this is a contention which is forwarded by many parties who have been the recipient of an unfavorable result in a legal action. However, this appellant did have the benefit of a full hearing on his Motion for Relief from Judgment and also had the benefit of a higher court's review of the full case and proceedings therein. In addition, it is clear that the questions potentially involved in this case are so unsubstantial as not to need further argument. Under the circumstances, there is plainly no need for further review by this court.

For all of the foregoing reasons, appellee moves that this appeal be dismissed.

Respectfully submitted,

WALTER C. BEALL
Attorney for Appellee
Beall, Hermanies & Bortz
200 Dixie Terminal Bldg.
Cincinnati, Ohio 45202
513-621-2345